No. 92-5184-CFY
Status: DECIDED

Title: Wayne Eugene Walker, Petitioner
v.
United States

Docketed:
July 21, 1992

Court: United States Court of Appeals for the Fifth Circuit

Vide:
92-5188
92-5257

Counsel for petitioner: Houp,Kenneth

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jul 21 1992	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Aug 19 1992		Order extending time to file response to petition until September 23, 1992.
5	Sep 9 1992		Brief of respondent United States in opposition filed. VIDED.
6	Sep 10 1992		DISTRIBUTED. September 28, 1992
8	Oct 5 1992		REDISTRIBUTED. October 9, 1992
10	Oct 13 1992		REDISTRIBUTED. October 16, 1992
12	Oct 26 1992		REDISTRIBUTED. October 30, 1992
14	Nov 2 1992		Petition DENIED. Dissenting opinion by Justice White with whom Justice Blackmun joins. (Detached opinion.)

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NO. 92-5184

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

WAYNE EUGENE WALKER,

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Respectfully submitted,

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Washington, D.C. 20530

July, 1992

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NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

WAYNE EUGENE WALKER,

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

QUESTION PRESENTED FOR REVIEW

I. Whether the weight of "toxic waste" material containing a detectable amount of a controlled substance, which is the byproduct of the drug manufacturing process, should be included in the calculation of a defendant's base offense level under the Federal Sentencing Guidelines.

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NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

WAYNE EUGENE WALKER,

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Wayne Eugene Walker, respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, case number 91-8396, United States v. Walker, is attached in the Appendix.

JURISDICTION

The Fifth Circuit Court of Appeals judgment that is sought to be reviewed was filed and entered on April 24, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Pursuant to Supreme Court Rule 13.1 and 28 U.S.C. §2101(c), this petition is timely if filed by July 23, 1992.

UNITED STATES SENTENCING GUIDELINE

Those portions of the United States Sentencing Guidelines involved are:

Guidelines Manual, §2D1.1, Drug Quantity Table n.* (Nov. 1989), which states in pertinent part:

> [T]he weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance.

Guidelines Manual, §2D1.1, Application No. 1 (Nov. 1989), which states in pertinent part:

> "Mixture or substance" as used in this guideline has the same meaning as in 21 U.S.C. §841.

STATEMENT OF THE CASE

Petitioner, Wayne Eugene Walker, and co-Petitioners Joe Guerra and Robert Bouvier, were charged along with Michael Kelly and Lisa Prinz[1] with conspiracy to possess with intent to distribute and possession with intent to distribute[2] methamphetamine in a two count indictment filed in the United States District Court for the Western District of Texas, Austin Division, on March 6, 1990.

No pre-trial hearing was held, because a plea agreement between the United States and Petition Walker was executed and filed on June 21, 1990. Re-arraignment on a plea of guilty was had on June 22, 1990. Sentencing was set for October 16, 1990.

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[1] Kelly and Prinz did not appeal.

[2] All emphasis is seriously intended, as it directly bears on the ludicrous and dangerously far-reaching ramifications referred to by the dissent in Chapman vs. U.S., 500 U.S., _____, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991)

On October 16, 1990, the trial court rejected the plea agreement and entered a plea of "Not Guilty" for Petitioner.

Jury selection finally began and was concluded on June 3, 1991. Trial commenced on June 4, 1991, and concluded on June 6, 1991, when the jury returned a verdict of guilty to Counts I and II for conspiracy to possess with intent to distribute and possession with intent to distribute[2A] methamphetamine.

On February 20, 1990, Petitioner was arrested pursuant to an investigation by the Austin Police Department. Seized pursuant to Petitioner's arrest, and the arrest of co-defendants Guerra, Bouvier, Kelly and Prinz, and several non-federally charged defendants, was 146.77 grams of methamphetamine. The next day, February 21st, a search warrant was executed at a residence near Lake Travis in Travis County, Texas. At that location, cleaned (washed) laboratory glassware was found, and, in addition, 54.5 pounds of toxic solvents with a "trace" of methamphetamine and P2P were found. Government chemist Ralph Owen testified that he didn't quantify the amount of methamphetamine in the amount of toxic waste product, but estimated the amount to be "one per cent." Owen opined that the 54.5 pounds of solvent was "left over" from a methamphetamine "cook".

Government chemist Owen testified he would not inject or "use" the 54.5 pounds of toxic solvents left over from the manufacturing process, although he testified it might be possible to recover some chemicals from the process. No evidence was

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[2A] See footnote 2, supra, and opinions of other circuits, infra.

presented by the Government that the Petitioner or his co-defendants had either the intellectual or technical abilities, much less the equipment, to recover anything from the toxic solvents in the 54.5 pounds of waste.

Walker filed an objection to the presentence report prior to sentencing. His argument to the Probation Officer's inclusion of the 54.5 pounds of toxic waste in his base guideline was overruled.

Omitting the 54.5 pounds of toxic waste from the sentencing guidelines equation is the astronomical difference between the 188-235 months range and the real 63-78 month range.

ARGUMENT FOR ALLOWANCE OF THE WRIT

TO INCLUDE THE WEIGHT OF TOXIC SOLVENT IN THE DETERMINATION OF THE DRUG AMOUNT FOR SENTENCING GUIDELINE PURPOSES IS INCOMPREHENSIBLE AND UNJUST, AND IS AT ODDS WITH THIS COURT'S CHAPMAN OPINION AND LEGISLATIVE INTENT. THE COURTS OF APPEAL HAVE REACHED CONFLICTING RESULTS ON THIS ISSUE AND THIS CASE PRESENTS AN IMPORTANT ISSUE OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

> Great cases, like hard cases, make bad law.
> Northern Securities Co. v. U.S., 193 U.S. 197, 24 S.Ct. 436, 468 (1904) (Holmes, dissent)

> My objective all sublime
> I shall achieve in time -
> To make the punishment fit the crime.
> William Gilbert, The Mikado, Act II

The Fifth Circuit opinion in Petitioner's case, and its ancestors, United States v. Mueller, 902 F.2D 336 (5th Cir. 1990); United States v. Butler, 895 F.2d 1016 (5th Cir. 1989), cert.

denied _____ U.S. _____, 111 S.Ct. 82, 112 L.Ed.2d 54 (1990); and United States v. Baker, 883 F.2d 13 (5th Cir. 1989), cert. denied, 493 U.S. 983, 110 S.Ct. 517, 107 L.Ed.2d 518 (1989), is not only bad law, but it defies logic.

In the opinion below, the Fifth circuit disingenuously attempts to distinguish Chapman v. U.S., 500 U.S. ____, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991), by stating:

> Chapman did not involve methamphetamine; nor did it involve a liquid. Hence, the [Supreme] Court did not speak to the issue of whether the weight of liquid waste containing methamphetamine should serve as a basis for computing a defendant's offense level. (parenthetical added) Walker, at slip opinion 4302.

What the Fifth Circuit ignores is that Petitioner did not conspire or intend to distribute 54.5 pounds of toxic waste product containing a trace of methamphetamine. There was no proof other than that the 54.5 pounds was left over from the manufacturing process.

The circuit courts have split over the question of whether unusable waste may constitute a "mixture or substance" within the meaning of the sentencing guidelines. This Court should review this case to clearly establish the proper application of §2D1.1 of the Sentencing Guidelines.

> §2D1.1 Drug Quantity Table, n *, provides:
>
> [T]he weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance.

Application Note 1, from the commentary following §2D1.1, provides:

> "Mixture or substance" as used in this guideline has the same meaning as in 21 U.S.C. §841.

"Mixture or substance" is not defined in 21 U.S.C. §841. This Court interpreted that language in Chapman. The question presented in that case was whether the weight of the blotter paper used to distribute LSD should be included in the weight of the "mixture or substance containing a detectable amount" of LSD when calculating the sentence of a defendant convicted of distributing LSD.

This Court's analysis of the "mixture or substance" language in Chapman relied heavily on the facts before the Court concerning LSD distribution. Pure doses of LSD involve such an infinitesimal amount of the drug that it must be distributed to retail customers in a "carrier". This Court took note of the methods by which LSD is transferred to blotter paper or gelatin; the paper or gel is then cut into "one-dose" squares which are distributed to consumers. The petitioners in Chapman argued that the weight of the LSD carrier is irrelevant to culpability and should not be included for purposes of sentence computation.

In reaching a decision in Chapman, this Court looked to legislative intent and concluded that "Congress clearly intended the dilutant, cutting agent, or carrier medium to be included in the weight of those drugs for sentencing purposes." Id. at 1924.

> The current penalties for LSD distribution originated in the Anti-Drug Abuse Act of 1986, Pub.L. 99-570, 100 Stat. 3207 (1986). Congress adopted a "market-oriented" approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence. H.R.Rep. No. 99-845, pt. 1, pp. 11-12, 17 (1986). To implement that principle, Congress

> set mandatory minimum sentences corresponding to the weight of a "mixture or substance containing a detectable amount of" the various controlled substances, including LSD. 21 U.S.C. §§841(b)(1)(A)(i)-(viii) and (B)(i)-(viii). Id. at L.Ed.2d 535 (emphasis added).

To Chapman's argument that inclusion of the weight of the LSD "carrier" is arbitrary and without a rational basis, this Court responded that it is a rational sentencing scheme to measure drug quantity according to the "street weight" of drugs in the diluted form in which they are sold, rather than according to the net weight of the active component. This results in the assessment of stiffer penalties for distribution of larger quantities of drugs. Although blotter paper is technically not a dilutant, it facilitates distribution of the drug by "mak[ing] LSD easier to transport, store, conceal and sell. It is a tool of the trade for those who traffic in the drug and therefore it was rational for Congress to set penalties based on this chosen tool." Id. at L.Ed.2d 539.

The entire premise of this Court's decision in Chapman was that Congress would have intended the weight of the LSD "carrier" to be considered as a "mixture or substance" for sentencing purposes because it is distributed with the drug. Congress' "market-oriented" approach dictates that sentences be assigned in accordance with marketable drug quantities. The greater the quantity involved in drug trafficking, the stiffer the penalty should be.

This logic is inapplicable to toxic waste materials containing detectable drug amounts. The quantity of toxic waste materials bears no relation to the quantity of distributable

drugs. There is no hint in the legislative history of 21 U.S.C. §841 that Congress intended penalties for drug offenses to be commensurate with the quantity of unusable toxic liquid byproducts which were fortuitously discovered prior to disposal.

The circuit courts have reached conflicting decisions on the question of whether the weight of waste materials should be included in the calculation of drug quantities for sentencing purposes. In U.S.v. Rolande-Gabriel, 938 F.2d 1231 (11th Cir. 1991), decided subsequent to this Court's decision in Chapman, the Court determined that the weight of an unusable liquid carrier medium containing cocaine should not be included in sentencing calculations. In reaching its decision in Rolande-Gabriel, the Court looked to the policies behind the Sentencing Guidelines.

> The Policy Statement of the Sentencing Guidelines states that "Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. [Congress also] sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity." [U.S.S.G., Ch. 1, Pt. A], at 1.2 (emphasis added). The Policy Statement goes on to note that the Commission deliberately avoided a system of broad discretion in sentencing ranges because to do so
>
> > would have risked correspondingly broad disparity in sentencing,.... Such an approach would have risked a return to the wide disparity that Congress established the Commission to reduce and would have been contrary to the Commission's mandate set forth in the Sentencing Reform Act of 1984.
>
> Id., at 1.3. In order to bring about a coherent system of rational and uniform sentencing, the Commission chose to adopt an emperical (sic) method of sentencing. Id., Rolande-Gabriel, 938 F.2d at 1235.

As the Court pointed out in Rolande-Gabriel, the Sentencing Commission's comment, indicating that "mixture or substance" has the same meaning as it does in 21 U.S.C. §841, conflicts with the

policies of rationality and uniformity which the guidelines were adopted to serve. Strict application of the "mixture or substance" language to include the weight of unusable mixtures would result in disparate and irrational sentences.

> This hyper-technical and mechanical application of the statutory language defeats the very purpose behind the Sentencing Guidelines and creates an absurdity in their application: the disparate and irrational sentencing arising out of a "rational and uniform" scheme of sentencing. Id., at 1235.

The Court concluded that the most rational course was to interpret "mixture or substance" in light of the purposes behind the Sentencing Guidelines in order to achieve "the greatest degree of uniformity and rationality in sentencing." Id.

The Rolande-Gabriel Court distinguished the Chapman decision on the basis that the LSD and other drugs considered in Chapman "were usable, consumable, and ready for wholesale or retail distribution when placed on standard carrier mediums, such as blotter paper, gel, and sugar cubes", while "the cocaine mixture in this case was obviously unusable while mixed with the liquid waste material." Id. at 1237. Furthermore, the standard carrier mediums ar issue in Chapman facilitate the marketing of LSD and other drugs, while the liquid waste in Rolande-Gabriel did nothing to further cocaine distribution. Noting that in the Chapman case, the Supreme Court declined to apply the rule of lenity, the Court held in Rolande-Gabriel that the rule must be applied to the facts of that case in order to avoid a fundamentally absurd result.

> Although it is logical to base sentences upon the gross weight of usable mixtures, it is fundamentally absurd to give an individual a more severe sentence for a mixture which is

> unusable and not ready for retail or wholesale distribution while persons with usable mixtures would receive far less severe sentences. Id., at 1237.

The Court therefore vacated the sentence imposed and remanded for resentencing.

The instant case presents stronger facts calling for exclusion of the weight of the unusable mixture than those in Rolande-Gabriel. The unusable mixture in Rolande-Gabriel contained easily recoverable cocaine powder. The unusable liquid seized from the Walker property was waste which contained detectable drug amounts which could be recovered only with great difficulty or not at all. The liquid in this case was uningestable; that was apparently not the case in Rolande-Gabriel.

The methamphetamine mixture at issue in U.S. v. Jennings, 945 F.2d 129 (6th Cir. 1991), was "cooking" in a crockpot at the time it was seized. The question presented by that case was whether the weight for sentencing purposes should be that of the entire mixture or that of the estimated amount of methamphetamine which would have been produced. The Court concluded that inclusion of the entire weight of the mixture would be illogical and contrary to the legislative intent underlying the sentencing scheme.

> If the Crockpot contained only a small amount of methamphetamine mixed together with poisonous unreacted chemicals and byproducts, there would have been no possibility that the mixture could be distributed to consumers. At this stage of the manufacturing process, the defendants were not atempting to increase the amount of metamphetamine they had available to sell by adding a dilutant, cutting agent, or carrier medium, but rather were attempting to distill methamphetamine from the otherwise uningestable byproducts of its manufacture. Id., at 137.

The Court cited Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982), for the proposition that statutory interpretations which produce absurd results must be avoided if there are alternative interpretations consistent with legislative intent. Concluding, however, that the record was not fully developed with respect to the contents of the crockpot, the Court remanded the case for an evidentiary hearing.

In U.S. v. Touby, 909 F.2d 759, 773 (3rd Cir.), aff'd on other grounds, 111 S.Ct. 1752 (1991), the Court recognized the validity of a sentencing distinction between a consumable and marketable drug in which a cutting or distributing agent, or a carrier medium, is found in combination with the drug itself, and a case where what is found is merely unconsumable waste material, bound for the garbage can rather than for the market. The defendant argued in that case that 97% of the 100 gram "slab" containing the designer drug Euphoria contained poisonous ingredients which rendered the substance unconsumable. Although the Third Circuit implied that the rationale of defendant's position was persuasive, the Court found insufficient facts to support the argument, noting that

> There was no attempt to prove at trial or at the sentencing hearing that these ingredients were manufacturing byproducts rather than a "cut" ... There is no basis in this record to deviate from the general rule that the total weight of the drug should be used for determining the criminal offense level. Id., at 773.

In U.S. v. Beltran-Felix, 934 F.2d 1075 (9th Cir.), cert. denied, _____ U.S. _____ (1992), the Court reached a conclusion diametrically opposite to that of the Jennings Court on similar

facts. The defendant in Beltran-Felix was "cooking" methamphetamine at the time of his arrest. He argued that the weight of the entire methamphetamine solution should not be considered for sentencing purposes because it was not in a distributable state. The Court declared that it could find no legislative history requiring that "mixture or substance" be interpreted to mean "a [readily marketable] mixture or substance." Id. at 1076. Finding no statutory exemption to the byproducts of methamphetamine manufacture, the Court held that it made no difference that the methamphetamine had not yet been processed into its final form. Accordingly, the Court upheld the inclusion of the entire weight of the methamphetamine mixture.

The Fifth Circuit has consistently held that waste materials are to be included in determining the base offense level. In U.S. v. Baker, supra, the Court determined that the entire weight of a liquid methamphetamine mixture was properly used to calculate the base offense level, depsite recognition of the fact that most of the liquid was waste material. The Fifth Circuit affirmed the Baker holding in U.S. v. Mueller, supra, which raised the same issue concerning the inclusion of the weight of 8.5 gallons of methamphetamine mixture in sentencing calculations. See also, U.S. v. Butler, supra.

These Fifth Circuit cases point out the disparity of sentences that can occur due to the happenstancial discovery of some waste product. The purpose of the Sentencing Guidelines was to make sentences for similar crimes similar. It is fundamentally absurd to argue that if one methamphetamine manufacturer who

produces 147 grams of methamphetamine with 54.5 pounds of toxic byproduct, be punished more severely than another methamphetamine manufacturer who produces 147 grams of methamphetamine with only 10 pounds of toxic byproduct.

While there may be some logic to the inclusion of the entire weight of methamphetamine mixture seized during the manufacturing process, see U.S. v. Dorrough, 972 F.2d 498 (10th Cir. 1991), it is beyond the pale to consider the weight of toxic leftovers. Unusable byproducts of the drug manufacturing process will almost always contain detectable amounts of controlled substances. In the "moonshine" era of our history, it would be surprising if the leftover "mash" used to produce a gallon of "white lightening" didn't contain a detectable amount of alcohol. The only evidence before the trial Court was Government Chemist Owen's testimony that the 54.5 pounds was waste material.

The entire scheme of the sentencing guidelines, as they pertain to narcotics cases, entails the imposition of sentences based on the amount of narcotics involved. Sentencing judges are permitted to estimate drug quantity where the amount seized does not reflect the scale of the offense. Guidelines Manual, §2D1.1, comment. (n.12). Such estimates may be based on cash amounts (U.S. v. Hughes, _____ F.2d _____, 1991 WL 270219 (8th Cir. Dec. 20, 1991)); quantity of precurser chemicals (U.S. v. Macklin, 927 F.2d 1272 (2d Cir.), cert. denied, 112 S.Ct. 146 (1991); U.S. v. Evans, 891 F.2d 686 (8th Cir.), cert. denied, 110 S.Ct. 2170 (1990); U.S. v. Andersen, 940 F.2d 593 (1991)); testimony of witnesses as to actual drug purchases (U.S. v. Vazzano, 906 F.2d

879 (2d Cir. 1990)); and the manufacturing capacity of drug laboratories (U.S. v. Putney, 906 F.2d 477 (9th Cir. 1990); U.S. v. Smallwood, 920 F.2d 1231 (5th Cir.), cert. denied, 111 S.Ct. 2870 (1991)). Each of these cases was based upon the premise, embodied in the sentencing guidelines, that the sentence must be proportional to the drug quantity which has been, or could be, produced for distribution.

In this case, there is no rational relationship between the amount of liquid waste and the quantity of marketable drugs which were, or could have been, produced. The recovery of the liquid mixture in this case was a purely serendipitous factor. Inclusion of the weight of the 54.5 pound mixture to determine the base offense level in this case flies in the face of the sentencing guideline purposes of uniform and rational sentencing.

The statutory and guideline "mixture or substance" language does not encompass waste material which might contain detectable amounts of controlled substance. The holding that toxic waste material is to be treated the same as a cutting agent mixed with a drug works a gross injustice on persons such as Petitioner. Such an interpretation of the Anti-Drug Abuse Act produces a result which this Court termed in Chapman as "so 'absurd or glaringly unjust'" as to raise a "reasonable doubt" concerning congressional intent. Id., at L.Ed.2d 537 (quoting U.S. v. Rodgers, 466 U.S. 475 (1984) and Moskal v. U.S., 498 U.S. ____, 111 S.Ct. 461 (1990)).

The Fifth Circuit's decision in this case has produced an arbitrary result which offends the due process of law protections

of the Fifth Amendment. Chapman, supra at L.Ed.2d 538. In Bolling v. Sharpe, 347 U.S. 497 (1954), this Court held that the Due Process Clause of the Fifth Amendment, which contains no equal protection clause, is violated by federal government action which would violate the equal protection clause of the Fourteenth Amendment if it were State action.

The facts of this case, unlike those presented to this Court in Chapman, call for the application of the rule of lenity. As the Rolande-Gabriel Court declared, an illogical disparity results from imposition of a more severe sentence on individuals arrested with unusable, toxic, unmarketable mixtures than on persons holding distributable drug quantities.

The interpretation of the "mixture or substance" language to include toxic waste leads to sentences which are not rationally related to offenses. Further, a divergence in sentences based solely on the weight of toxic waste is not rationally related to the legitimate statutory and guideline goal of reducing drug use by imposing uniform sentences which punish major drug traffickers more severely than minor dealers.

Statutes should be construed to avoid constitutional questions. U.S. v. Albertini, 472 U.S. 675, 680 (1985); U.S. v. Monsanto, 491 U.S. 600 (1989). Unjust and irrational sentences can be avoided either by reading "mixture or substance" to exclude toxic waste materials or by declaring the entire statute

unconstitutional. This Court should step in to guide the lower courts on this issue.[3]

This Court should accept certiorari in this case in order to resolve the conflict between the Circuit Courts of Appeal on this issue, send a clear message on the application of the Sentencing Guidelines to those Courts of Appeal and, in the process, clarify its holding in Chapman. To do otherwise, would leave this issue in chaos.

CONCLUSION

For the reasons stated above, Petitioner Wayne Eugene Walker respectfully requests that this Honorable Court grant his petition for a writ of certiorari to the Fifth Circuit Court of Appeals.

Respectfully submitted,

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COURT APPOINTED COUNSEL
FOR PETITIONER

[3] See also, U.S. v. Acosta, ____ F.2d ____ 2nd Cir., No. 91-1527, decided 5-13-92).

CERTIFICATE OF SERVICE

I hereby certify that on this the 20th day of July, that two true and correct copies of the foregoing was mailed to the Solicitor General of the United States, 10th & Constitution Avenue, NW, Room 5143, Washington, D.C. 20530, and to Mr. David Wright (Attorney for Robert Bouvier), 1680 One American Center, 600 Congress Avenue, Austin, Texas 78701, and Mr. James Nias, (Attorney for Joe Guerra), 100 Congress Avenue, Suite 1100, Austin, Texas 78701.

KENNETH E. HOUP, JR.

UNITED STATES COURT OF APPEALS

FILED

JUN 9 1992

U. S. DISTRICT COURT
CLERK'S OFFICE
By _____ Deputy

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED

APR 24 1992

GILBERT F. CANUCHEAU
CLERK

No. 91-8396

D.C. Docket No. A-90-CR-30-05, 04

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOE GUERRA

Defendant -Appellant .

Appeal from the United States District Court for the Western District of Texas

Before GARWOOD and DeMOSS, Circuit Judges, and DUPLANTIER[1], District Judge.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

April 24, 1992

ISSUED AS MANDATE: JUN 5 1992

A true copy
Test
Clerk, U. S. Court of Appeals, Fifth Circuit
By _____ Deputy JUN 5 1992
New Orleans, Louisiana

[1]District Judge of the Eastern District of Louisiana, sitting by designation.

100

UNITED STATES COURT OF APPEALS

FILED

JUN 9 1992

U. S. DISTRICT COURT
CLERK'S OFFICE
By _____ Deputy

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED

APR 24 1992

GILBERT F. CANUCHEAU
CLERK

No. 91-8396

D.C. Docket No. A-90-CR-30-05, 04

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WAYNE EUGENE WALKER

Defendant -Appellant .

Appeals from the United States District Court for the Western District of Texas

Before GARWOOD and DeMOSS, Circuit Judges, and DUPLANTIER[1], District Judge.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

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By _____ Deputy JUN 5 1992
New Orleans, Louisiana

[1]District Judge of the Eastern District of Louisiana, sitting by designation.

ATTACHMENT "A"

101

UNITED STATES of America,
Plaintiff-Appellee,

v.

Wayne Eugene WALKER and
Joe Guerra, Defendants-
Appellants.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Robert BOUVIER, Defendant-Appellant.

Nos. 91-8396, 91-8423.

United States Court of Appeals,
Fifth Circuit.

April 24, 1992.

Defendants either pled guilty or were convicted by jury in the United States District Court for the Western District of Texas at Austin, James R. Nowlin, J., of conspiracy to possess with intent to distribute more than 100 grams of methamphetamine and possession with intent to distribute methamphetamine. On consolidated appeals, the Court of Appeals, Duplantier, District Judge, sitting by designation, held that: (1) district court correctly used total weight of liquid substance containing small percentage of methamphetamine in calculating base offense level, despite fact that most of liquid was waste material; (2) delays resulting from district court's sua sponte continuances of hearing on pretrial motions and grant of government's motion for continuance were not excludable from calculation of time under Speedy Trial Act; (3) methamphetamine was still properly classified as schedule II controlled substance, and sufficient evidence existed that subject methamphetamine was not descheduled substance; and (4) defendant's warrantless arrest was based upon probable cause and thus did not violate Fourth Amendment.

Affirmed.

1. Drugs and Narcotics ⇐133

In calculating quantity of methamphetamine seized in determining defendants' base offense levels under Sentencing Guidelines, district court correctly used total weight of liquid substance containing methamphetamine found in laboratory, despite fact that most of liquid was waste material. U.S.S.G. § 2D1.1, Table n.*, 18 U.S.C.A.App.

2. Criminal Law ⇐577.8

Delays resulting from district court's sua sponte continuations of hearing on pretrial motions, and from grant of government's motion to continue that hearing based upon death in family and hospitalization of wife of assistant United States Attorney handling case, would be excluded from computation of time under Speedy Trial Act, even though delays were not requested or caused by defendants. 18 U.S.C.A. § 3161(c)(1), (h)(1)(F).

3. Criminal Law ⇐577.8

Delays resulting from pretrial motions will toll trial clock indefinitely; there is no independent requirement that delay attributable to motions be reasonable. 18 U.S.C.A. § 3161(h)(1)(F).

4. Drugs and Narcotics ⇐46

Methamphetamine is still properly classified as schedule II controlled substance, notwithstanding Drug Enforcement Administration (DEA) descheduling of products containing diluted isomers of methamphetamine.

5. Conspiracy ⇐47(12)
Drugs and Narcotics ⇐123(2)

In trial for conspiracy to possess with intent to distribute more than 100 grams of methamphetamine and possession with intent to distribute methamphetamine there was sufficient evidence that methamphetamine introduced by government was not one of the descheduled substances containing diluted isomers of methamphetamine.

6. Criminal Law ⇐394.2(2)

Question that federal court must ask when evidence secured by state officials is to be used as evidence against defendant accused of federal offense is whether actions of state officials in securing evidence violated Fourth Amendment to United States Constitution, not whether state officials' actions in arresting defendant were lawful or valid under state law. U.S.C.A. Const.Amend. 4.

7. Arrest ⇐63.4(2, 11)

Fourth Amendment dictates that warrantless arrest be based upon "probable cause," which exists when facts and circumstances within knowledge of arresting officer are sufficient to cause person of reasonable caution to believe that offense has been or is being committed; arresting officer does not have to have personal knowledge of all facts constituting probable cause, which can rest upon collective knowledge of police when there is communication between them. U.S.C.A. Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

8. Arrest ⇐63.4(10)

Police had probable cause to arrest defendant, based on police officer's discovery from confidential informant that defendant was in possession of precursor chemicals used to manufacture methamphetamine, as well as other information provided by confidential informant and cooperating individual. U.S.C.A. Const. Amend. 4.

9. Criminal Law ⇐1158(4)

Court of Appeals accepts trial court's credibility choices and factual findings based upon live testimony at suppression hearing unless findings are clearly erroneous or influenced by incorrect view of the law.

10. Criminal Law ⇐1250

In calculating narcotics conspiracy defendant's base offense level under Sentencing Guidelines, district court did not clearly err in concluding that defendant was average participant in conspiracy, that he had not accepted responsibility, and that he had obstructed justice, even though initial presentence report characterized defendant as "minor participant" in conspiracy and deducted two points for acceptance of responsibility. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

Appeals from the United States District Court for the Western District of Texas.

Before GARWOOD and DEMOSS, Circuit Judges, and DUPLANTIER,* District Judge.

* District Judge of the Eastern District of Louisiana, sitting by designation.

DUPLANTIER, District Judge:

Investigations by the Austin, Texas, Police Department resulted in the discovery of a clandestine methamphetamine laboratory and the arrests of defendants, Robert Bouvier, Joe Guerra, and Wayne Walker, along with others.[1] Defendants were charged in a two-count indictment: count one charged a conspiracy to possess with intent to distribute more than 100 grams of methamphetamine; count two charged possession with intent to distribute methamphetamine. After defendant Bouvier successfully moved to sever his trial, defendants Walker and Guerra were convicted by a jury on both counts of the indictment. Bouvier subsequently entered into a plea agreement with the government, reserving his right to appeal the district court's denial of his pre-trial motions, and pleaded guilty to count one of the indictment.

In these consolidated appeals, all defendants contend that the district court improperly calculated the quantity of methamphetamine seized in determining their base offense levels under the Sentencing Guidelines. They also contend that the district court erred in denying their motions to dismiss based upon violations of the Speedy Trial Act, 18 U.S.C. § 3161, and based upon failure of the indictments to state an offense on the theory that methamphetamine has been "descheduled" as an unlawful drug. As noted hereafter, all three of these contentions are foreclosed by precedent in this circuit. In addition, defendant Walker presents a sufficiency of the evidence claim, and defendant Guerra contends that the district court erred in denying his motion to suppress his confession and other evidence and in calculating his offense level for sentencing. Finding that the district court committed no error, we affirm.

WEIGHT OF METHAMPHETAMINE IN COMPUTING GUIDELINES

[1] In executing a search warrant at a residence where they found the methamphetamine laboratory, police seized a quantity of a toxic liquid substance consisting of phenylacetone and a small percentage of methamphetamine. At trial, a chemist testified that the liquid was probably a waste product left over from the methamphetamine manufacturing process. At Bouvier's sentencing hearing, the government stipulated that "over ninety-five per cent of the volume or weight of those liquids" was solvents. Defendants contend that the district court erred in its application of the sentencing guidelines when it used the total weight of the liquid in calculating their offense levels.

This court has consistently rejected arguments similar to defendants'.[2] *See United States v. Mueller*, 902 F.2d 336 (5th Cir. 1990); *United States v. Butler*, 895 F.2d 1016 (5th Cir.1989), *cert. denied*, — U.S. —, 111 S.Ct. 82, 112 L.Ed.2d 54 (1990); *United States v. Baker*, 883 F.2d 13 (5th Cir.), *cert. denied*, 493 U.S. 983, 110 S.Ct. 517, 107 L.Ed.2d 518 (1989). In *Baker*, the court held that the district court correctly used the total weight of a liquid substance containing methamphetamine in calculating

1. Defendants were indicted along with Michael Kelly and Lisa Prinz, who are not appellants in this proceeding.

2. In the Fifth Circuit, "one 'panel may not overrule the decision, right or wrong, of a prior panel,' ... in the absence of en banc reconsideration or superseding decision of the Supreme Court." *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir.1991) (citations omitted).

defendant's base offense level, despite that fact that most of the liquid was waste material. *Baker*, 883 F.2d at 14–15.[3]

In *Butler*, the court found that defendant's offense level had been properly calculated based upon thirty-eight and one-half pounds of a liquid consisting of seven to fourteen grams of methamphetamine and the remainder "lye water." *Butler*, 895 F.2d at 1018. The court found that the defendant's argument was foreclosed by the specific language[4] of the guidelines and by the holding in *Baker*. Finally, in *Mueller*, the court rejected defendant's argument that his offense level had been calculated improperly based upon 8.5 gallons of methamphetamine, because the mixture seized consisted largely of acetone rather than methamphetamine. *Mueller*, 902 F.2d at 345. Again, the court confirmed that *Baker* foreclosed such an argument. *Id.*

Defendants assert that the Supreme Court's recent decision in *Chapman v. United States*, — U.S. —, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991), effectively overruled *Baker* and its progeny. We disagree. In *Chapman*, the Court held that the weight of the blotter paper used to distribute LSD and not simply the weight of the pure LSD should be used for sentencing, because the blotter paper is a mixture or substance containing a detectable amount of LSD. *Id.* 111 S.Ct. at 1922. The Court found that the words "mixture" and "substance" in 21 U.S.C. § 841(b)(1)(B)(v) and the sentencing guidelines, given their ordinary meaning, would include the blotter paper. *Id.* at 1925–26. It also found that such a sentencing scheme was rational because, although blotter paper is not used to "dilute" LSD, it facilitates the distribution of the drug and makes LSD easier to "transport, store, conceal, and sell." *Id.* at 1928. *Chapman* did not involve methamphetamine; nor did it involve a liquid. Hence, the Court did not speak to the issue of whether the weight of liquid waste containing methamphetamine should serve as a basis for computing a defendant's offense level. Thus, *Chapman* did not overrule *Baker*. To the contrary, much of the language in *Chapman* supports this court's decision in *Baker*.[5]

In sentencing defendants, the district court correctly used the entire weight of a mixture or substance containing a detectable amount of methamphetamine.

3. We note that for sentencing purposes Congress has provided that 100 grams of "methamphetamine" is equivalent to a kilogram of "a mixture or substance containing a detectable amount of methamphetamine," 21 U.S.C. § 841(b)(1)(A)(viii), and 10 grams of "methamphetamine" is equivalent to 100 grams of "a mixture or substance containing a detectable amount of methamphetamine." 21 U.S.C. § 841(b)(1)(B)(viii).

4. The guidelines provide: "Unless otherwise specified, the weight of a controlled substance ... refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance." Note following Drug Quantity Table, United States Sentencing Guidelines § 2D1.1.

5. The Sixth and Eleventh Circuits have held that liquid waste should not be included in determining the relevant amount of drugs for sentencing purposes. *United States v. Jennings*, 945 F.2d 129 (6th Cir.1991); *United States v. Rolande-Gabriel*, 938 F.2d 1231, (11th Cir.1991). Contrary to defendants' arguments, those courts did not find that *Chapman* required such a conclusion. In fact, they distinguished *Chapman* in reaching their conclusions. *Jennings*, 945 F.2d at 136; *Rolande-Gabriel*, 938 F.2d at 1235–36. In addition, the issue of whether liquid waste should be used in weighing drugs seemed to be one of first impression in both circuits. Thus, those courts were not bound by previous decisions in their own circuits, as we are.

SPEEDY TRIAL ACT

[2] All defendants contend that the district court erred in denying their motions to dismiss based upon violations of the Speedy Trial Act, 18 U.S.C. § 3161. The Act requires that "the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date of the information or indictment...." 18 U.S.C. § 3161(c)(1). The Act also provides for the exclusion of "[a]ny period of delay resulting from other proceedings concerning the defendant, including ... delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion...." 18 U.S.C. § 3161(h)(1)(F).

Defendants were indicted on March 6, 1990. On March 26 they filed a variety of pre-trial motions, which were set for hearing. Before the motions were heard, defendants entered into plea agreements with the government and entered pleas of guilty. In October, the district court rejected defendants' guilty pleas and reset the pre-trial motions for hearing on January 4, 1991. Defendants filed additional pre-trial motions before January 4. Defendants concede that, aside from the twenty days between the filing of the indictments and the first pre-trial motions, all time up until January 3 should be excluded under the Act. The excludability of the delays after January 3 is at issue.

On January 3, the district court *sua sponte* continued the hearing on the pretrial motions until February 19. On February 13, the court continued the hearing *sua sponte* until April 15. On April 18, the court granted the government's motion to continue the hearing based upon a death in the family and hospitalization of the wife of the Assistant United States Attorney handling the case. On April 19, May 6, and May 9, Walker, Bouvier, and Guerra, respectively, filed their motions to dismiss based on violations of the Speedy Trial Act, which the district court denied orally after a hearing on all of the pre-trial motions, on May 20–21. The court filed a written order regarding the rulings a few days later.[6]

Defendants contend that because the delays after January 3 were not requested or caused by them, those delays should not be excluded from computation of time under the Act. An identical argument was rejected in *United States v. Horton*, 705 F.2d 1414, 1416 (5th Cir.), *cert. denied*, 464 U.S. 997, 104 S.Ct. 496, 78 L.Ed.2d 689 (1983). There, defendants attacked the exclusion of the period of time during which motions were pending as unjustified, "asserting that little or none of it was occasioned at their request or on their account." *Id.* "Even assuming this to be so," the court concluded that defendants' argument must fail because the Act is "all but absolute" in excluding time during which motions are pending. *Id.* An exception might be justified in a particularly egregious case, for example, when defendants have presented "repeated unsuccessful requests for hearings or ... other credible indication that a hearing had been deliberately refused with intent to evade the sanctions of the Act." *Id.* Like the defendants in *Horton*, defendants have not presented such a case here. Defendants conceded at oral argument that during the pendency of their motions they neither complained of the delay nor did anything to expedite a decision on their motions.

Defendants Walker and Guerra also complain that the district court erred by not following the requirements of section (h)(8)(A) of the Act, which excludes

> [a]ny period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

18 U.S.C. § 3161(h)(8)(A). The district court's orders continuing the hearings *sua sponte* did not contain such a finding, although the court made such a finding with regard to all continuances in its written order denying defendants' pre-trial motions.

[3] It is not necessary to determine whether the delays at issue should be excluded under section 8(A), because the delays are specifically excluded by section 1(F) as delays resulting from pre-trial motions. Delays resulting from pre-trial motions "'will toll the trial clock indefinitely; there is no independent requirement that the delay attributable to the motions be reasonable.'" *United States v. Santoyo*, 890 F.2d 726, 728 (5th Cir.1989), *cert. denied*, 495 U.S. 959, 110 S.Ct. 2567, 109 L.Ed.2d 749 (1990) (quoting *United States v. Kington*, 875 F.2d 1091, 1109 (5th Cir. 1989) (citations omitted)).

METHAMPHETAMINE NOT DESCHEDULED

[4] Defendants also contend that the district court erred in denying their motions to dismiss the indictments for failure to charge an offense: they argue that the Drug Enforcement Administration descheduled methamphetamine and failed to follow the proper procedure for rescheduling it. Thus, they reason, methamphetamine is not a controlled substance.

Defendants argue that methamphetamine was descheduled in 1976 when the DEA descheduled Rynal Spray and Vicks Inhaler, products containing diluted isomers of methamphetamine. Defendants' argument is precluded by the Fifth Circuit's recent opinion in *United States v. Martinez*, 950 F.2d 222 (5th Cir.1991). There, the court concluded that, although the DEA descheduled Rynal and Vicks Inhaler, the DEA did not deschedule all forms of methamphetamine, and thus, "methamphetamine is still properly classified as a schedule II controlled substance." *Id.* at 224.[7]

WALKER'S SUFFICIENCY OF THE EVIDENCE CLAIM

[5] Defendant Walker contends that even if methamphetamine is properly scheduled as a controlled substance, the evidence at trial was insufficient to show that the methamphetamine introduced by the government was not one of the substances descheduled by 21 C.F.R. § 1308.22. *Martinez* makes clear that the substances descheduled by section 1308.22 were Rynal Spray and Vicks Inhaler, which

6. Trial of Walker and Guerra commenced on June 3, 1991. Bouvier entered his plea of guilty to count one of the indictment on June 24, 1991.

7. In so concluding, the Fifth Circuit agreed with decisions of the Eighth and Ninth Circuits. *See United States v. Durham*, 941 F.2d 886, 889–90 (9th Cir.1991); *United States v. Roark*, 924 F.2d 1426, 1428 (8th Cir.1991).

contain specific quantities of controlled substances. The chart contained in section 1308.22 lists excluded nonnarcotic products and designates for each product a company name, trade name, controlled substance contained therein, and specific quantity of the controlled substance. The controlled substances listed in the chart were not descheduled altogether; they were descheduled only in the form of Rynal Spray and Vicks Inhaler.[8]

Thus, the jury's verdict must be affirmed if any rational trier of fact could have found beyond a reasonable doubt that the substance seized was methamphetamine, but not Rynal Spray or Vicks Inhaler. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *United States v. Carrasco*, 830 F.2d 41, 43 (5th Cir.1987). Considering the evidence in the light most favorable to the government, and accepting all reasonable inferences that tend to support the jury's verdict, we affirm the verdict. *Carrasco*, 830 F.2d at 43–44; *United States v. Marx*, 635 F.2d 436 (5th Cir.1981). Chemist Ralph Owen testified that the methamphetamine at issue was not Vicks Inhaler or Rynal Spray. Likewise, Chemist Anthony Arnold testified that the methamphetamine was not in the form of Rynal Spray or Vicks Inhaler. Given this testimony, a rational trier of fact could have found beyond a reasonable doubt that the methamphetamine introduced by the government was an illegal controlled substance.

GUERRA'S MOTION TO SUPPRESS

Defendant Guerra contends that the district court erred in denying his motion to suppress the physical evidence obtained as a result of his warrantless arrest, as well as the confessions that he made following the arrest. Guerra contends that the physical evidence and confession were fruits of an arrest that was unlawful under Texas law and, as such, should be suppressed. The government contends that federal law controls, and that probable cause existed for Guerra's arrest, making it valid under federal law. Alternatively, the government asserts that Guerra's arrest was valid also under Texas law.

[6] Defendant Guerra's argument to the contrary, the proper inquiry in determining whether to exclude the evidence at issue is not whether the state officials' actions in arresting him were "lawful" or "valid under state law." The question that a federal court must ask when evidence secured by state officials is to be used as evidence against a defendant accused of a federal offense is whether the actions of the state officials in securing the evidence violated the Fourth Amendment to the United States Constitution. This is so because, absent an exception, the exclusionary rule requires that evidence obtained in violation of the Fourth Amendment be suppressed. The exclusionary rule was created to discourage violations of the Fourth Amendment, not violations of state law. *See Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914).

In *United States v. Garcia*, 676 F.2d 1086 (5th Cir.1982), this court excluded evidence that it found to have been obtained pursuant to arrests by state officers because the court determined that the arrests were illegal under Texas law. The Supreme Court vacated *Garcia* and remanded to the panel for reconsideration in light of *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). *See Garcia*, 676 F.2d 1086 (5th Cir.1982), *vacated and remanded*, 462 U.S. 1127, 103 S.Ct. 3105, 77 L.Ed.2d 1360 (1983). *Ross* discusses the Fourth Amendment standards governing a warrantless search of a container in an automobile. "By remanding *Garcia* for reconsideration in light of the fourth amendment standards announced in *Ross*, the Court perforce instructed that state law did not control the case and that the admissibility of evidence depends on the legality of the search and seizure under federal law." *United States v. Mahoney*, 712 F.2d 956, 959 (5th Cir.1983), *cert. denied*, 468 U.S. 1220, 104 S.Ct. 3590, 82 L.Ed.2d 887 (1984). *See also United States v. Mitchell*, 783 F.2d 971, 973 (10th Cir.), *cert. denied*, 479 U.S. 860, 107 S.Ct. 208, 93 L.Ed.2d 138 (1986).

Whether the Fourth Amendment has been violated is determined solely by looking to federal law on the subject. *See California v. Greenwood*, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988). There, the Supreme Court rejected a claim that the Fourth Amendment required suppression of evidence resulting from a warrantless search and seizure that was illegal under California law.

> Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution. We have never intimated, however, that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs.

Id. 108 S.Ct. at 1630. The Fifth Circuit has recognized that

> [b]ecause it is a creature of the federal courts and because it ought to be applied in a manner that promotes uniformity in federal cases, federal law must guide our decision whether to apply the exclusionary rule whether or not the legality of the underlying arrest or search turns on state law.

Mahoney, 712 F.2d at 959.

We are aware that in *United States v. Di Re*, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1947), the Supreme Court reversed a federal conviction because it was based upon evidence obtained from an arrest that was illegal under state law. We agree with the Tenth Circuit's conclusion that *Di Re* "was rejected, by implication," in *Elkins v. United States*, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960): " 'The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed.' " *United States v. Miller*, 452 F.2d 731, 733 (10th Cir.1971), *cert. denied*, 407 U.S. 926, 92 S.Ct. 2466, 32 L.Ed.2d 813 (1972) (quoting *Elkins*, 364 U.S. at 224, 80 S.Ct. at 1447). *See Mahoney*, 712 F.2d at 959, n. 3. A commentator has suggested that "*Di Re* is simply an instance of the Court utilizing its supervisory power to exclude from a federal prosecution evidence obtained pursuant to an illegal but constitutional federal arrest" by a local police officer. LaFave, *Search and Seizure*, § 1.5(b) at 107. If that is so, *United States v. Payner*, 447 U.S. 727, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980), makes clear that the Court is no longer interested in using its supervisory power to exclude

8. The current version of section 1308.22 no longer lists Rynal Spray as an excluded product. *See* 21 C.F.R. § 1308.22 (1991).

evidence obtained unlawfully but under circumstances not violative of the Fourth Amendment. A federal court should not "use its supervisory power to suppress evidence tainted by gross illegalities that did not infringe the defendant's constitutional rights." *Id.* at 733, 100 S.Ct. at 2445.

[7] The Fourth Amendment dictates that a warrantless arrest be based upon probable cause. *United States v. De Los Santos*, 810 F.2d 1326, 1336 (5th Cir.), *cert. denied*, 484 U.S. 978, 108 S.Ct. 490, 98 L.Ed.2d 488 (1987). Thus, in determining whether to suppress the evidence at issue, the inquiry is whether the officers had probable cause to arrest Guerra. "Probable cause 'exists when the facts and circumstances within the knowledge of the arresting officer are sufficient to cause a person of reasonable caution to believe that an offense has been or is being committed.'" *Id.* (quoting *United States v. Antone*, 753 F.2d 1301, 1304 (5th Cir.), *cert. denied*, 474 U.S. 818, 106 S.Ct. 64, 88 L.Ed.2d 52 (1985)). "The arresting officer does not have to have personal knowledge of all the facts constituting probable cause; it can rest upon the collective knowledge of the police when there is communication between them." *Id.* (citing *United States v. Webster*, 750 F.2d 307, 323 (5th Cir.1984), *cert. denied*, 471 U.S. 1106, 105 S.Ct. 2340, 85 L.Ed.2d 855 (1985)).

[8] It is clear that probable cause existed for the officers to arrest Guerra and that the district court did not err in denying Guerra's motion to suppress. Before Guerra's arrest, Austin Police Department Officer Randall Milstead learned from a confidential informant that Guerra was in possession of precursor chemicals used to manufacture methamphetamine. In connection with the local law enforcement officials, Gray Hildreth, a special agent with the DEA, also investigated allegations that Guerra was selling methamphetamine. A confidential informant told Agent Hildreth that Guerra and defendant Bouvier were associates and that they had taken the informant to a residence where chemicals were stored for the manufacture of methamphetamine.

Jean Messina, who later became a cooperating individual, told an undercover officer that she could provide him with methamphetamine and took the officer to the Silvermine Hotel. While the officer stayed in the car, Messina went into a hotel room and returned approximately one half hour later with methamphetamine. Messina was arrested. When interviewed, she agreed to cooperate with the officers. She told them that she had received the methamphetamine from Guerra, who was inside the Silvermine Hotel with Ladawn Page. In a telephone call to the hotel room, Messina arranged delivery of additional methamphetamine. The phone call was recorded by the officers with Messina's consent. When Guerra and Page left the hotel, officers arrested them.[9] The facts known to the officers before they arrested Guerra clearly were sufficient to cause a person of reasonable caution to believe that an offense had been or was being committed.

[9] Guerra also contends that the district court erred in refusing to suppress his confession on the ground that it was not voluntarily given. After conducting a

9. Guerra was in possession of methamphetamine and precursor chemicals used to manufacture methamphetamine. After having been brought to the Austin Police Department and read his rights, Guerra made incriminating oral and written statements.

hearing at which Ladawn Page and several police officers testified, the district court determined that Guerra's confession was voluntary. We accept a trial court's credibility choices and factual findings based upon live testimony at a suppression hearing unless the findings are clearly erroneous or influenced by an incorrect view of the law. *United States v. Rogers*, 906 F.2d 189, 190 (5th Cir.1990). The district court credited the testimony of the officers present during Guerra's confession to the effect that Guerra desired to cooperate and that he voluntarily made oral statements and signed the written statement. The court's credibility choices and factual findings are not clearly erroneous.

CALCULATION OF GUERRA'S BASE OFFENSE LEVEL

[10] Finally, defendant Guerra contends that his base offense level was calculated in such a way as to violate due process and penalize him for having exercised his right to a trial. He comes to this conclusion by comparing the presentence report prepared at the time of the plea agreement that was rejected by the district court with the presentence report prepared after trial. He complains specifically of three changes. First, while the initial report characterized Guerra as a "minor participant" in the conspiracy, the post-trial report characterized him as an "average participant," increasing his offense level by two points. Second, the initial report deducted two points for acceptance of responsibility, and that deduction was not allowed after trial. Finally, the post-trial report added two points for obstruction of justice, based upon a letter written by Guerra to his girlfriend, Ladawn Page, who was to be a witness at his trial.

"The district court's sentence will be upheld so long as it results from a correct application of the guidelines to factual findings that are not clearly erroneous." *United States v. Rivera*, 898 F.2d 442, 445 (5th Cir.1990) (citing *United States v. Buenrostro*, 868 F.2d 135, 136–37 (5th Cir.1989)). Guerra's argument is frivolous. He cites no authority for his position; nor does he point to any evidence to show that the district court was clearly erroneous in concluding that Guerra was an average participant, that he had not accepted responsibility, or that he had obstructed justice. To the contrary, each of the changes appears to have been proper, because they reflected testimony and evidence adduced at trial. The trial judge was intimately familiar with the facts of this case; the findings that he made in calculating Guerra's base offense level are not clearly erroneous.

CONCLUSION

Finding no error, we AFFIRM the convictions and sentences of all defendants.

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UNITED STATES DISTRICT COURT

OFFICE OF THE CLERK
WESTERN DISTRICT OF TEXAS
200 W. 8TH
AUSTIN, TEXAS 78701

CHARLES W. VAGNER
CLERK

(512) 482-5898
JURY INFO. (512) 482-5898

June 9, 1992

Mr. James Nias
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Assistant U. S. Attorney
650 First City Centre
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RE: #A-90-CR-30 USA VS. Joe Guerra (04) & Wayne Walker (05)

The above captioned case was returned from the Fifth Circuit Court of Appeals on June 9, 1992. As stated in Local Rule CR-55, "The party offering any exhibit or deposition shall be responsible for its removal from the clerk's office within sixty (60) days after the final disposition of the case, including appeal thereof. A detailed receipt shall be given by the party to the clerk. Any exhibit or deposition remaining more than sixty (60) days after final disposition of the case, including appeal, may be destroyed or otherwise disposed of by the clerk."

We are enclosing an exhibit receipt form for your use. Please contact our office to make arrangements to pick up the exhibits. In accordance with Local Rule CR-55, if the exhibits are not claimed by August 9, 1992, they will be disposed of by the clerk.

Sincerely yours,

CHARLES W. VAGNER

By: Gary Locke
Deputy

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Austin, Texas, _____ 19____

I, the undersigned, do hereby acknowledge receipt on this day of the following listed exhibits in No. _____,

styled: _____ vs. _____,

the withdrawal of which is authorized by Local Rules of Court:

_____

_____

_____

_____

_____

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_____

_____

_____

(Signature)

IN THE NITED STATES COURT OF APP. LS
FOR THE FIFTH CIRCUIT

No. 91-8396

UNITED STATES OF AMERICA,

Plaintiff-Appellees,

versus

WAYNE EUGENE WALKER, and
JOE GUERRA,

Defendants-Appellants.

U.S. COURT OF APPEALS
FILED
MAY 26 1992
GILBERT E. GANUCHEAU
CLERK

Appeal from the United States District Court for the
Western District of Texas

ON SUGGESTIONS FOR REHEARING EN BANC

(Opinion 4/24/91, 5 Cir., 1992, F.2d)

(May 26, 1992)

Before GARWOOD, DeMOSS, Circuit Judges, and DUPLANTIER, District Judge.

PER CURIAM:

(✓) Treating the suggestions for rehearing en banc as petitions for panel rehearing, it is ordered that the petitions for panel rehearing are DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

( ) Treating the suggestions for rehearing en banc as petitions for panel rehearing, the petitions for panel rehearing are DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.

REHG-9

ATTACHMENT "B"

Reh. fld. 5/8/92

AO 245 B (Rev. 4/10)(W.D.Tx. rev.) Sheet 1 - J ment in a Criminal Case

UNITED STATES DISTRICT COURT
Western District of Texas

FILED
Jul 12 3 27 AM '91
U.S. OFFICE
BY DEPUTY

UNITED STATES OF AMERICA

v.

Case Number: A-90-CR-30(5)
USAO Number: 90-01068

WAYNE EUGENE WALKER
Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, WAYNE EUGENE WALKER, was represented by Kenneth Houp and Robert Lloyd.

The defendant was found guilty on count(s) 1 and 2 of the indictment by a jury verdict on June 6, 1991, after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date of Offense	Count Number(s)
CONTRARY TO 21:841(a)(1). IN VIOLATION OF 21:846	CONSPIRACY TO POSSESS WITH INTENT TO DISTRIBUTE METHAMPHETAMINE	02/20/90	1
21:841(a)(1)	POSSESSION WITH INTENT TO DISTRIBUTE METHAMPHETAMINE	02/20/90	2

As pronounced on JULY 9, 1991, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $ 100.00, for count(s) 1 and 2 of the indictment, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 9th day of July, 1991.

JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

Defendant's SSN: 443-66-8335
Defendant's Date of Birth: 11/29/62
Defendant's address: c/o HAYS COUNTY JAIL, 1307 Old Uhland Road, San Marcos, TX 78666

ATTACHMENT "C"

67.

Defendant: WAYNE EUGENE WALKER
Case Number: A-90-CR-30(5)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **TWO HUNDRED AND EIGHTY EIGHT (288) MONTHS** on each of Counts I and 2. IT IS FURTHER ORDERED that the period of imprisonment imposed on Count 2 shall run concurrently to the period of imprisonment imposed on Count 1.

The Court makes the following recommendations to the Bureau of Prisons: that the defendant be incarcerated at a federal correctional institution where he may receive treatment and counselling for substance abuse.

The defendant is continued in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: WAYNE EUGENE WALKER
Case Number: A-90-CR-30(5)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **FIVE (5) YEARS**.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

X If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

__ If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.

X The defendant shall neither own nor possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4) The defendant shall support his or her dependents and meet other family responsibilities.
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: WAYNE EUGENE WALKER
Case Number: A-90-CR-30(5)

FINE

The defendant shall pay a fine of $ 5,000.00. This fine includes any costs of incarceration and supervision.

This amount is the total of the fines imposed on individual counts, as follows:
$2,500.00 on each of Counts I and 2

The Court has determined that the defendant does not have the ability to pay interest, and it is accordingly ordered that the interest requirement is waived.

This fine shall be paid at the direction of the United States Probation Office to the Clerk, United States District Court.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

Defendant: WAYNE EUGENE WALKER
Case Number: A-90-CR-30(5)

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	38
Criminal History Category:	I
Imprisonment Range:	235 months to 293 months
Supervised Release Range:	at least 5 years
Fine Range:	$25,000 to $ 4,000,000
Restitution:	$ N/A

The fine is below the guideline range, because of the defendant's inability to pay.

The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason: Due to the overall seriousness of the offense conduct.

Nos. 92-5184, 92-5188, and 92-5257

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

WAYNE EUGENE WALKER, JOE GUERRA, AND
ROBERT WAYNE BOUVIER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

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13 pp

QUESTION PRESENTED

Whether a solution of methamphetamine and chemicals is a "mixture or substance containing a detectable amount of methamphetamine," for purposes of 21 U.S.C. 841(b) and Sentencing Guidelines § 2D1.1, without regard to whether the solution is ingestible or marketable.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

Nos. 92-5184, 92-5188, and 92-5257

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, Pet. App. 4299-4308,[1] is reported at 960 F.2d 409.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1992. The petitions for a writ of certiorari were filed on July 21, 1992 (Nos. 92-5184 and 92-5188) and on July 23, 1992 (No. 92-5257). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "Pet. App." refers to the petition appendix in No. 92-5184.

STATEMENT

After a trial in the United States District Court for the Western District of Texas, petitioners Walker and Guerra were convicted of conspiracy to possess methamphetamine with the intent to distribute it, in violation of 21 U.S.C. 846, and of possession of methamphetamine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). After entering a guilty plea, petitioner Bouvier was convicted of conspiracy to possess methamphetamine with the intent to distribute it, in violation of 21 U.S.C. 846. Petitioner Walker was sentenced to 288 months' imprisonment, to be followed by five years' supervised release. Petitioner Guerra was sentenced to 235 months' imprisonment, to be followed by five years' supervised release. Petitioner Bouvier was sentenced to 210 months' imprisonment, to be followed by five years' supervised release. The court of appeals affirmed all three convictions and sentences.

1. Petitioners and others engaged in a conspiracy to manufacture methamphetamine that culminated with their arrests in February 1990. Officers of the Austin, Texas, Police Department seized various quantities of methamphetamine during their investigation of petitioners' drug ring. In addition, the officers discovered the methamphetamine laboratory itself at a private residence. The officers seized a 54.5-pound liquid mixture at that laboratory. A government expert testified at trial that the liquid mixture contained detectable amounts of methamphetamine and phenylacetone (otherwise known as P2P, a precursor controlled

substance used to manufacture methamphetamine). The expert acknowledged that the mixture most likely was left over from a methamphetamine "cook" and that it was not then in a usable state, although the phenylacetone could be distilled from the mixture and used to manufacture additional methamphetamine, and "seventy-five percent of the weight of phenyl acetone could be converted into methamphetamine." 6/5/91 Tr. 142. The expert estimated that the mixture contained around 1% methamphetamine, and the parties stipulated at petitioner Bouvier's sentencing hearing that solvents made up at least 95% of the mixture. Pet. App. 4301; 7/18/91 Tr. 4-5; 6/5/91 Tr. 136-139, 141-143.

2. An issue at each sentencing hearing involved the quantity of methamphetamine that should be considered under the Sentencing Guidelines. Petitioners argued that the court should consider only 146 grams of methamphetamine seized during the investigation leading to this prosecution. According to petitioners, the additional 54.5-pound mixture seized at the methamphetamine laboratory should not be included because it was waste material that could not be ingested or marketed. The district court rejected that argument and sentenced petitioners based on the weight of the mixture as well as the remaining methamphetamine. See 7/9/91 Tr. 42-43, 50-51; 7/18/91 Tr. 7, 13-14; Gov't C.A. Br. 4.[2]

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[2] Inclusion of that amount resulted in base offense level of 36 (although petitioner Bouvier inexplicably was given a base offense level 34), which applies to "[a]t least 10 KG but less than 30 KG of Methamphetamine." Sentencing Guidelines § 2D1.1(c)(4). While petitioners now claim that excluding the 54.5 pounds would

3. The court of appeals affirmed. Pet. App. 4299-4308. In addition to rejecting several other challenges that petitioners do not renew here, the court held that petitioners had properly been sentenced based on the weight of the 54.5-pound liquid mixture as well as the remaining amounts of methamphetamine seized during the investigation. Id. at 4301-4302. The court relied on its "consistent[]" holdings that sentencing courts should consider "the total weight of a liquid substance containing methamphetamine in calculating [a] defendant's base offense level, despite the fact that most of the liquid was waste material." Ibid. (citations omitted). Contrary to petitioners' claim that these holdings were "effectively overruled" by Chapman v. United States, 111 S. Ct. 1919 (1991), the court held that "much of the language in Chapman supports" prior Fifth Circuit case law. Pet. App. 4302.

ARGUMENT

The court of appeals correctly held that the weight of a mixture containing detectable amounts of methamphetamine and P2P must be factored into the drug quantities used to determine

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have resulted in "astronomical[ly]" lower sentences, e.g., 92-5184 Pet. 4, that assertion assumes that the remaining 146 grams were not "actual" (or in the words of the former Guideline, "pure") methamphetamine. See Sentencing Guidelines § 2D1.1 n.* (1989 and 1991 versions). Although the district court's inclusion of the 54.5-pound mixture obviated the need for proof on this point, the remaining 146 grams undoubtedly were substantially purer than the 54.5-pound mixture. Assuming that at least 100 grams of the seized methamphetamine qualified as "actual" or "pure" methamphetamine, petitioners' base offense levels would have been 32. See Sentencing Guidelines § 2D1.1(c)(6) The difference between the top of Offense Level 32 and the bottom of Offense Level 36 is between 40 and 60 months' imprisonment across all of the Criminal History categories -- which, while not insignificant, is not "astronomical," as petitioners suggest.

petitioners' Guidelines sentences. Given this Court's past treatment of similar cases, there is no basis for further review.

1. The Sentencing Guidelines provide that "[u]nless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance." Sentencing Guidelines § 2D1.1(c) n.*, at 82 (Nov. 1, 1991). See also id. n.1, at 83 ("'Mixture or substance' as used in this guideline has the same meaning as in 21 U.S.C. § 841"). With respect to methamphetamine, the Sentencing Guidelines, as well as the statute, specifically reinforce the notion that sentencing may be based either on the weight of the actual drug itself or on the weight of the entire mixture or substance containing a detectable amount of the drug. Sentencing Guidelines § 2D1.1(c) (basing penalties either on the weight of "Methamphetamine (actual)" or on a ten-fold greater weight of the entire mixture containing a detectable amount of methamphetamine). See also 21 U.S.C. 841(b)(1)(A)(viii) (establishing ten-year minimum sentence for traffickers of "100 grams or more of methamphetamine * * * or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine"). The Sentencing Guidelines explain in this regard that:

> The terms "PCP (actual)" and "Methamphetamine (actual)" refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined

> by the weight of the PCP (actual) or methamphetamine (actual), whichever is greater.

Sentencing Guidelines § 2D1.1(c) n.*, at 82 (Nov. 1, 1991).

There is no exception, either in the statute or the Sentencing Guidelines, allowing the exclusion of a "mixture" containing detectable amounts of controlled substances on the ground that the mixture consists principally of "waste material" or is not "ingestible" or "marketable."

2. Petitioners rely on Chapman v. United States, supra, to argue that the courts may count the weight of a material only if it is ingestible or marketable. In fact, this Court's decision in the Chapman case supports the Fifth Circuit's ruling in this case.

This Court held in Chapman v. United States, supra, that LSD-infused blotter paper is a "mixture or substance" for purposes of 21 U.S.C. 841(b), so that the weight of the blotter paper as well as the drug itself must be considered in calculating a defendant's sentence under that law and the Sentencing Guidelines. This Court held that because neither the statute nor the Sentencing Guidelines define the terms "mixture" or "substance" and because those terms did not have an established meaning at common law, they must be given their "ordinary" dictionary meanings. Chapman, 111 S. Ct. at 1925 (citation omitted). Although the Court did not consider how the term "substance" should be defined, it noted that the term "mixture" is defined "to include 'a portion of matter consisting of two or more components that do not bear a fixed proportion to one another and that however thoroughly commingled are regarded as retaining a separate existence.'" Id. at 1926 (quoting Webster's

Third New International Dictionary 1449 (1986)). The Court added that "[a] mixture may also consist of two substances blended together so that the particles of one are diffused among the particles of the other." Ibid. (quoting 9 Oxford English Dictionary 921 (2d ed. 1989)).

This case fits comfortably within those dictionary definitions of a "mixture." The methamphetamine and chemicals in the solution were "thoroughly commingled [yet] are regarded as retaining a separate existence," Chapman, 111 S. Ct. at 1926, and were "blended together so that the particles of one are diffused among the particles of the other," ibid. Moreover, in explaining why LSD and blotter paper constitute a mixture, the Court in Chapman listed several factors that apply fully to the methamphetamine solution in this case: the "LSD crystals are inside of the paper so that they are commingled with it"; the "LSD is diffused among the fibers of the paper"; and the LSD "cannot easily be distinguished from the blotter paper, nor easily separated from it." 111 S. Ct. at 1926.

The only distinguishing factor between this case and Chapman is that, while the solution here was not proved to be ingestible or consumable, "[l]ike cutting agents used with other drugs that are ingested, the blotter paper, gel, or sugar cube carrying LSD can be and often is ingested with the drug." 111 S. Ct. at 1926. Yet, the Court did not hold in Chapman that ingestibility is a necessary element of the definition of a "mixture," and the Court's analysis

in that case suggests that it is not.[3] The petitioners in Chapman had argued against a dictionary definition of the term "mixture" by suggesting that giving that term such an interpretation would lead to the "nonsensical" inclusion of "carriers like a glass vial or an automobile in which the drugs are being transported." Id. at 1926. The obvious response, were ingestion critical, is that cars and glass vials are not intended to be consumed together with the drugs. The Court, however, followed a different tack, id. at 1926 (emphasis added):

> The term ["mixture"] does not include LSD in a bottle, or LSD in a car, because the drug is easily distinguished from, and separated from, such a "container." The drug is clearly not mixed with a glass vial or automobile; nor has the drug chemically bonded with the vial or car. It may be true that the weights of containers and packaging materials generally are not included in determining a sentence for drug distribution, but that is because those items are also clearly not mixed or otherwise combined with the drug.

3. Petitioners are correct that there is disagreement among the courts of appeals on the correct interpretation of the phrase "mixture or substance" for purposes of 21 U.S.C. 841(b) and Sentencing Guidelines § 2D1.1 in cases in which the material at issue is not ingestible or consumable, unlike the LSD-infused blotter paper at issue in Chapman. The First Circuit has held that

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[3] Whether or not an item is consumable may bear on whether it is a "substance" within the meaning of the statute and the Sentencing Guidelines. For example, a drug capsule and the powder it contains are not a "mixture," but the capsule qualifies as a "substance" containing the drug in powdered form, and the total weight of the capsule should be considered at sentencing. The language in Chapman thus may establish that LSD and blotter paper together are both a "mixture" and a "substance."

courts must count "as a "mixture" the entire weight of a suitcase made from chemically bonded cocaine and acrylic[4] and of a statue made from cocaine and beeswax.[5] The First Circuit's decisions are consistent with the Fifth Circuit's decision in this case and also with pre-Chapman decisions by the Third, Fifth, Ninth, and Tenth Circuits, ruling that the entire weight of a "mixture or substance" must be counted, even if only a small portion is a consumable drug and the bulk of the mixture consists of nonconsumable precursor chemicals or by-products.[6] By contrast, in post-Chapman decisions the Second, Sixth, Ninth, and Eleventh Circuits have recently considered and expressly rejected that position. Those courts have

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[4] United States v. Mahecha-Onofre, 936 F.2d 623, 625-626 (1st Cir.), cert. denied, 112 S. Ct. 648 (1991); United States v. Lopez-Gil, 965 F.2d 1124 (1st Cir. 1992).

[5] United States v. Restrepo-Contreras, 942 F.2d 96 (1st Cir. 1991), cert. denied, 112 S. Ct. 955 (1992).

[6] E.g., United States v. Beltran-Felix, 934 F.2d 1075 (9th Cir. 1991) (solution containing methamphetamine not in a distributable state was nonetheless a "mixture or substance" for sentencing purposes), cert. denied, 112 S. Ct. 955 (1992); United States v. Dorrough, 927 F.2d 498 (10th Cir. 1991) (methamphetamine solution); United States v. Callihan, 915 F.2d 1462, 1463 (10th Cir. 1990) (94-pound mixture containing only 2.95 kilograms of phenyl-2-propanone; the remainder was unreacted chemicals and by-products); United States v. Touby, 909 F.2d 759, 772-773 (3d Cir. 1990) (100-gram slab containing only 2.7% pure 4-methylaminorex (Euphoria)), aff'd on other grounds, 111 S. Ct. 1752 (1991); United States v. McKeever, 906 F.2d 129, 133 (5th Cir. 1990) (phenylacetone), cert. denied, 111 S. Ct. 790 (1991); United States v. Mueller, 902 F.2d 336, 345 (5th Cir. 1990) (liquid acetone containing methamphetamine); United States v. Butler, 895 F.2d 1016 (5th Cir. 1989) (statute and Sentencing Guidelines required a sentence based on total weight of 38-1/2 pound mixture that contained only small amount of methamphetamine), cert. denied, 111 S. Ct. 82 (1990); United States v. Baker, 883 F.2d 13, 15 (5th Cir.) (40-pound solution containing only a small amount of methamphetamine), cert. denied, 493 U.S. 983 (1989).

held that only the weight of a consumable or ingestible mixture may be counted and that if a drug is found in a nonconsumable solution, only the weight of the pure drug may be considered for sentencing purposes, even if the combination of materials would be deemed a "mixture" under the ordinary meaning of that term.[7]

Nonetheless, we do not believe that review is warranted in this case. We did not oppose certiorari in Mahecha-Onofre because the courts of appeals have taken divergent approaches on the issue whether the term "mixture or substance" is limited to materials that are ingestible or consumable, as was the LSD-infused blotter paper in question in Chapman. This Court, however, declined to review that question in Mahecha-Onofre and in two other cases last Term. See Mahecha-Onofre v. United States, 112 S. Ct. 648 (1991); Beltran-Felix v. United States, 112 S. Ct. 955 (1992); Fowner v. United States, 112 S. Ct. 1998 (1992). Petitioners' claim for an exception to the plain meaning of the term "mixture or substance" is not materially different from the claims advanced by the petitioners in those cases. Because nothing has changed since this Court denied review in those cases, there is no reason to treat these petitions differently.

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[7] United States v. Robins, 967 F.2d 1387 (9th Cir. 1992) (mixture of cocaine and cornmeal); United States v. Acosta, 963 F.2d 551 (2d Cir. 1992), and United States v. Salgado-Molina, 967 F.2d 27 (2d Cir. 1992) (solution of cocaine and creme liqueur); United States v. Bristol, 964 F.2d 1088 (11th Cir. 1992) (solution of cocaine and wine); United States v. Jennings, 945 F.2d 129, 134-137 (6th Cir. 1991) (solution containing methamphetamine that was not in a consumable state); United States v. Rolande-Gabriel, 938 F.2d 1231 (11th Cir. 1991) (cocaine suspended in an unidentified and assumed unusable liquid).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEAN CONNELLY
Attorney

SEPTEMBER 1992

SUPREME COURT OF THE UNITED STATES

92–5184 WAYNE EUGENE WALKER
v.
UNITED STATES

92–5188 JOE GUERRA
v.
UNITED STATES

92–5257 ROBERT WAYNE BOUVIER
v.
UNITED STATES

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nos. 92–5184, 92–5188 AND 92–5257. Decided November 2, 1992

The petitions for writs of certiorari are denied.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

These three petitions raise a single issue: Whether the weight of waste products that are the byproduct of a drug manufacturing process and that contain a detectable amount of a controlled substance should be used for sentencing purposes under §2D1.1 of the United States Sentencing Commission Guidelines Manual (1990). The product in question was a toxic liquid substance consisting of phenylacetone and a small percentage of methamphetamine. At Joe Guerra's and Wayne Walker's trial, a chemist testified that the liquid was probably a waste product left over from the methamphetamine manufacturing process. Robert Bouvier pleaded guilty and, at his sentencing hearing, the government stipulated that over 95 percent of the weight of those liquids was solvents. Petitioners contend that their sentences should

not have been based on the total weight of the liquid. The Fifth Circuit rejected their argument. 960 F. 2d 409 (CA5 1992).

As I noted in *Fowner* v. *United States*, 504 U. S. ___ 1998 (1992) (WHITE, J., dissenting from denial of certiorari), the Courts of Appeals are in serious disagreement over this issue. Since that time, the Second, Third, and Ninth Circuits have joined the ranks of the Sixth and Eleventh Circuits in adopting the approach advocated by petitioners. See *United States* v. *Rodriguez*, Nos. 91–5455, 91–5494, and 91–5751, 1992 U. S. App. LEXIS 22744 (CA3, Sept. 18, 1992); *United States* v. *Robins*, 967 F. 2d 1387 (CA9 1992); *United States* v. *Salgado-Molina*, 967 F. 2d 27 (CA2 1992); *United States* v. *Acosta*, 963 F. 2d 551 (CA2 1992). In contrast, this case confirms the Fifth Circuit's alignment with the First and Tenth Circuits' position. See *United States* v. *Lopez-Gil*, 965 F. 2d 1124 (CA1 1992); *United States* v. *Sherrod*, 964 F. 2d 1501 (CA5 1992); *United States* v. *Dorrough*, 927 F. 2d 498 (CA10 1991).

Respondent acknowledges the existence of this split, but points to the actions of this Court as evidence that plenary consideration is unwarranted. Indeed, in the last Term alone, we have declined to review this question on three separate occasions. See *Fowner*; *Beltran-Felix* v. *United States*, 502 U. S. ___ (1992); *Mahecha-Onofre* v. *United States*, 502 U. S. ___ (1991).

I believe it is high time to resolve this enduring conflict that makes a defendant's sentence depend upon the circuit in which his or her case is tried. I therefore would grant certiorari.